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Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1395

GRAYCE E. CAROLLO, PETITIONER,

versus

S. S. KRESGE COMPANY, D/B/A K-MART,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Supreme Court of the United States

October Term, 1972

No. .....

GRAYCE E. CAROLLO, Petitioner,

versus

S. S. KRESGE COMPANY, D/B/A K-MART,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner prays that a Writ of Certiorari issue to review the decision and Judgment of the United States Court of Appeals for the Fourth Circuit, dated and entered in this case on the 6th day of March, 1972.

OPINIONS BELOW

The District Court filed no opinion. The opinion of the Court of Appeals (App. 19.) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 6, 1972. The jurisdiction of this Court is invoked under the provision of 28 U. S. C., section 1254.

QUESTIONS PRESENTED FOR REVIEW

1. Where, because of the ruling of the District Court, there is no occasion in the trial of a case for a plaintiff to introduce evidence of material facts in conflict with those produced by defendant on the issue of an affirmative defense, does a Court of Appeals, in reversing a judgment for plaintiff on such issue, have the power also to direct entry of judgment for defendant?

2. Whether, in a federal diversity case, either a Court of Appeals or a District Court has the power to decide factual issues arising from conflicting evidence or conflicting inferences from undisputed facts where according to the state practice such issues are decided by the trial judge, and not by a jury, subject to review by the appellate court?

3. May a Court of Appeals reverse the action of a trial judge dismissing an affirmative defense where the evidence adduced by defendant in support of such defense is legally insufficient to warrant the submission of the issue of such defense to the jury?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amendment VII.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

28 U. S. C. 2106.

"The Supreme Court or any other Court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Title 72, Workmen's Compensation, Code of Laws of South Carolina, 1952.

"Sec. 72-111. **Liability of owner to workmen of subcontractor.**

When any person * * * referred to as 'owner', undertakes to perform or execute any work which is part of his trade, business or occupation and contracts with any other person (* * * referred to as 'subcontractor') for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work and compensation under this Title which he would have been liable to pay if the workman had immediately been employed by him."

"Sec. 72-121. **Employee's rights under Title exclude all others against employer.**

The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee * * * as against his employer, at common law or otherwise, on account of such injury, loss of service or death."

"Sec. 72-101. **When acceptance of provisions presumed.**

Every employer and employee * * * shall be presumed to have accepted the provisions of this Title respectivley to pay and accept compensation for personal injury or death by accident arising out of and in the course of his employment and shall be bound thereby * * *."

STATEMENT OF CASE

This case is of remarkable similarity to *Byrd v. Blue Ridge Rural Electric Co-operative, Inc.*, 356 U. S. 525 which was decided by this Court in 1958.

Petitioner, a resident of South Carolina, brought suit against S. S. Kresge Company, d/b/a K-Mart, a Michigan Corporation, to recover damages for negligence in failing to exercise due care in the maintenance of a portion of its premises used in common by lessees thereof, as the result of which the petitioner fell on a slippery floor and sustained permanent crippling injuries. At the time of her injuries, petitioner was employed as the manager of a retail millinery business operated by a corporation known as Kraft, a lessee of space in respondent's premises where space was also leased to other businesses, and the remaining portion occupied by repondent for the conduct of its own business of retail sales.

* * *

Respondent answered and set up as one of its defenses that petitioner's remedy was exclusively under the South Carolina Workmen's Compensation Act, Sections 72-111 and 72-121, for the reason that petitioner at the time of her injury was engaged in work which was part of the trade, business and occupation of respondent.

The undisputed evidence of record is that respondent was not, at the time of petitioner's injuries or at any time

prior thereto, in the business of buying and selling millinery goods and merchandise, and that its employees never performed the work of buying and selling at retail millinery goods and merchandise or of managing any such business—work which petitioner was performing at the time of her injury.

The evidence of record further shows that the lessee Kraft, petitioner's employer, rented space from respondent who also agreed to furnish the lessee certain equipment, utilities and janitorial service. Under the lease agreement, it was expressly provided that the lessee shall be responsible for claims for damages resulting from the sale of its products or for personal injuries resulting from the negligence of the lessee.

The testimony according to the reporter's transcript and appendix included as part of the record on appeal in the Court below further shows that petitioner and the employees working under her supervision were paid directly by Kraft and not by respondent, nor did the respondent reimburse Kraft for such wages (Tr., 1, p. 206, Ls. 3-4, p. 285, Ls. 5-9, App., 62, 62);[1] that petitioner was hired by Kraft and the employees working under her supervision were hired by her and not by respondent (Tr., 1, p. 204, Ls. 11-18, p. 207, Ls. 23-25, p. 208, Ls. 1-21, App., 63); that the petitioner priced all merchandise for sale according to directions from Kraft and not from respondent (Tr., 1, p. 206, l.21.25, p. 207, Ls. 1-9, App., 50, 62); that petitioner ordered the millinery merchandise through Kraft, and respondent had nothing to do with the ordering of the merchandise (Tr., 1, p. 210, Ls. 11-25, App., 65); that the petitioner and the employees under her had separate time cards which were kept under petitioner's supervision and not by respondent (Tr., 1, p. 211, Ls. 14-23, App., 65, 66);

[1] References are to Reporter's Transcript (Tr.) and Appendix (App.) included in the Record in the Court of Appeals.

that vacation time for petitioner and the employees working under her were determined solely by Kraft (Tr., 1, p. 214, Ls. 17-21, App., 68); that the books and records of Kraft were maintained by petitioner who submitted them to Kraft and not to respondent (Tr., 1, p. 210, Ls. 11-25, p. 211, App., 67); that petitioner and the employees under her supervision did not and were not required to attend sales meetings of respondent's personnel and employees (Tr., 1, p. 285, Ls. 18-23) and that all incoming freight of Kraft's merchandise was handled solely by petitioner except on infrequent occasions when she required help to carry the freight to the Kraft storage area (Tr., 1, p. 190, Ls. 4-24, App., 51); and a separate stock room was kept by Kraft under its own lock and key (App., 51).

In view of absence of facts which were present in the South Carolina case of *Adams v. Davison-Paxon Company*, 230 S. C. 532, 96 S. E. (2d) 566, which held that a factual issue was presented therein, the petitioner, at the conclusion of respondent's case and before her case in reply, tested the legal sufficiency of respondent's evidence as to the issue of the affirmative defense by moving to dismiss the defense. The Honorable J. Robert Martin, Jr., United States District Judge, before whom the case was tried, with a jury, requested whether petitioner had any reply testimony to which the response was that if the motion were denied reply testimony would be offered.

Before Judge Martin ruled on the motion, respondent moved for a directed verdict on this issue. After hearing argument, Judge Martin granted petitioner's motion to dismiss and denied respondent's motion for a directed verdict, whereupon petitioner rested her case.

The case was then submitted to the jury on the issue of negligence, contributory negligence and damages, after which the jury brought in a verdict of $10,000.00 in favor of petitioner.

Respondent moved for judgment N. O. V. (but not for new trial) on all issues and petitioner moved for a new trial on the ground of inadequacy of damages. Judge Martin denied respondent's motion and granted petitioner's motion for new trial, limited to the issues of negligence, contributory negligence and damages. At the second trial the jury brought in a verdict for $20,000.00 in favor of the petitioner. Motion for partial new trial was made by petitioner on the ground of inadequacy of damages and the respondent also moved for judgment N. O. V. as to the issues of negligence and contributory negligence. Both motions were denied.

Respondent appealed from the refusals of District Judge J. Robert Martin, Jr., who presided at the first trial, and District Judge Donald Russell, who presided at the second trial, to grant respondent's motions for Judgment N. O. V., and petitioner cross-appealed, in *forma pauperis*, from the refusal of District Judge Donald Russell to grant a partial new trial limited to the issue of damages.

Upon appeal, the Court of Appeals reached a factual finding, from its own view of the testimony, that the evidence was sufficient to support a finding that the business of petitioner's employer, Kraft, was part of the trade, business and occupation of respondent. The Court, therefore, reversed the District Court's judgment.

The Court of Appeals did not stop there, however. The respondent not having moved for a new trial either in the District Court or upon appeal, the Court of Appeals, relying upon *Adams v. Davison-Paxon Company*, 230 S. C. 532, 96 S. E. (2d) 566, as being "indistinguishable" and controlling, assumed to resolve the conflicting inferences and determined the ultimate fact therefrom that Kraft's millinery business managed by petitioner was part of the trade, business and occupation of respondent; and thus undertook the power of not only reversing the ruling of the District

Judge, but also remanding the case with direction to enter judgment for respondent.

REASONS FOR GRANTING THE WRIT

1. **The decision by the Court below is not in accord with the applicable decisions of this Court:**—The issues in this case are (1) whether a Court of Appeals has the power to deny a party the opportunity of presenting testimony which he had no occasion to present at the trial because of the ruling of the District Judge, by directing entry of Judgment for the opposite party upon reversing the ruling of the District Judge; (2) whether a Court of Appeals has the power to weigh conflicting inferences in a diversity case by reason of the fact that such power is vested in the State courts by the state practice; and (3) whether a Court of Appeals may reverse the action of a District Judge dismissing an affirmative defense where the evidence is legally insufficient to support such defense.

On the first issue the decision of the Court below is in conflict with the holding of this Court that it is beyond the legitimate function of an appellate court, in reversing the ruling of a District Judge, to deprive a party of the right to controvert material facts and have a trial on the merits, by directing judgment against him, where such party had no occasion to dispute or controvert the material facts of the opposite party because of the ruling of the District Court declared erroneous by the Court of Appeals.

Weade v. Dickmann, Wright & Pugh, 337 U. S. 801;
Fountain v. Wilson, 336 U. S. 681;
Kaku Nagano v. McGrath, 342 U. S. 916;
Byrd v. Blue Ridge Rural Electric Co-operative, Inc., 356 U. S. 525.

In each case the question before this Court was whether the appellate court could order judgment for a

successful appellant on an issue as to which the opposite party had no occasion in the trial court to produce evidence or controvert the material facts of the successful appellant.

The rationale of the foregoing cases applies with equal force to the instant case which presents the same important general problem. Petitioner's motion to dismiss the affirmative defense before her reply case was based upon the particular legal theory that the evidence of respondent in support of its affirmative defense was legally insufficient to support a verdict for respondent on this defense and consequently did not warrant the presentation of any reply testimony by petitioner on the issue of such defense. This motion was granted, and, therefore, not only was there a lack of occasion to controvert respondent's testimony on this issue, but any further testimony on this point would have been superfluous and would have transgressed the ruling of the District Judge. The action of the District Judge in disposing of this issue at the first opportunity which in his opinion was appropriate and in accord with the rights of the parties was in consonance with the spirit of our federal procedural law as expressed in Rule 1 of the Federal Rules of Civil Procedure that there shall be a "just, speedy and inexpensive determination of every action."

The true effect of the holding of the Court below would be to deprive a party of the opportunity to present controverting evidence and the right to a jury trial at the risk of successfully challenging the legal sufficiency of an opponent's case and consequently add to the time and expense of the orderly administration of justice. Moreover, it would be violative of the 7th Amendment to the Constitution which was not framed nor adopted to deprive a party of either the right to a jury trial or of the right to challenge the legal sufficiency of the opponent's case. "The

Amendment is impartial in the guaranty of both." *Galloway v. U. S.*, 319 U. S. 372, 393.

Also the decision of the Court below directing entry of judgment for defendant is not an "appropriate" judgment which was "just" under the circumstances, and therefore not authorized by 28 U. S. C. 2106. *Bryan v. U. S.*, 338 U. S. 552.

The allowance of the petition in this case would afford this Court the opportunity to review and resolve the problems involved herein on an important question of federal procedural law and appellate review

2. **The action of the Court below constituted an invasion of the province of the jury contrary to the 7th Amendment to the United States Constitution:**—The Court below, in reversing, undertook to direct entry of judgment for respondent under the assumption that "the decision of the South Carolina Supreme Court in *Adams v. Davison-Paxon Company*, 230 S. C. 532, 96 S. E. (2d) 566 (1957) is indistinguishable and that it controls the decision here". Petitioner challenges both the assumption and the power of the Court below. She submits that there was an absence of facts in the instant case which presented a factual issue in the *Adams* case. Moreover, if, as the Court of Appeals concluded, the absence of such facts was immaterial, at the least, in accordance with the decision in the *Adams* case the evidence presented a factual issue of whether respondent was engaged in the millinery business so as to invoke the basic defense of the South Carolina Workmen's Compensation Act.

That it would be an undue invasion of the jury's historic function for an appellate court to weigh confleting inferences and conclusions that may be drawn from the evidence or undisputed facts is an established rule of judicial review.

Byrd v. Blue Ridge Rural Electric Co-operative, Inc., 356 U. S. 325;
Wilkerson v. McCarthy, 336 U. S. 53;
Lavender v. Kurn, 327 U. S. 645;
Sartor v. Arkansas Natural Gas Corp., 321 U. S. 621;
Tennant v. Peoria & Pekin Union R. Co., 321 U. S. 29.

The identical question in the instant case was before this Court in *Byrd v. Blue Ridge Rural Electric Co-operative, Inc., supra*. There, this Court pointed out that according to the leading South Carolina case on the subject, *Marchbanks v. Duke Power Co.*, 190 S. C. 336, 2 S. E. (2d) 825, the determination of the affirmative defense in question here "is in each case largely a question of degree and of fact". This Court also pointed out in clear and unequivocal language that the facts in the *Adams* case which the Court below characterized as "indistinguishable" from those in the instant case, presented a factual issue according to the decision of the South Carolina Supreme Court, the language of which this Court quotes in *Byrd*, 356 U. S. at pages 533 and 534, as follows:

> "A question is also presented as to whether on remand the factual issue is to be decided by the judge or by the jury. The respondent argues on the basis of the decision of the Supreme Court of South Carolina in *Adams v. Davison-Paxon Co.*, 230 S. C. 532, 96 S. E. (2d) 566, that the issue of immunity should be decided by the judge and not by the jury. That was a negligence action brought in the state trial court against a store owner by an employee of an independent contractor who operated the store's millinery department. The trial judge denied the store owner's motion for a directed verdict made upon the ground that § 72-111 barred the plaintiff's action. The jury returned a verdict for the plaintiff. The South Carolina Supreme Court reversed, holding that it was for the judge and

not the jury to decide on the evidence whether the owner was a statutory employer, and that the store owner had sustained his defense. The court rested its holding on decisions, listed in footnote 8, *infra*, involving judicial review of the Industrial Commission and said:

> 'Thus the trial court should have in this case resolved the conflicts in the evidence and determined the fact of whether . . . [the independent contractor] was performing a part of the trade, business or occupation' of the department store-appellant and, therefore, whether . . . [the employee's] remedy is exclusively under the Workmen's Compensation Law.' 230 S. C., at 543, 96 S. E. (2d) at 572."

Notwithstanding that the state practice requires the factual issue to be decided by the court, this Court made it clear that, contrary to the holding of the Court below, the state practice does not control, and that "under the influence—if no the command—of the Seventh Amendment," decisions of disputed questions of fact are assigned to the jury, *Byrd v. Blue Ridge*, *supra*, at page 537.

Therefore, assuming, *arguendo*, that the evidence was sufficient to create a factual issue, it is respectfully submitted that the Court below, by substituting its own view of the case for that which should be determined by a jury, has invaded the province of the jury, contrary to the rights of the petitioner under the Seventh Amendment to the United States Constitution.

3. **The action of the Court below, in reversing the ruling of the District Judge dismissing the affirmative defense, is inconsistent with applicable federal procedure and contrary to the applicable state law:**—The action of the Court below in reversing the ruling of the District Judge dismissing the affirmative defense is in direct conflict with the holding of this Court that where a party having the affirmative of an issue has the occasion and the opportun-

ity to produce evidence on such issue but the evidence produced thereon is legally insufficient to support the burden of the party's proof, such issue should be withdrawn from the consideration of the jury.

Galloway v. United States, 319 U. S. 372.

The Court below, in holding that the evidence was sufficient to support the affirmative defense, relied upon the South Carolina case of *Adams v. Davison-Paxon, supra.* It appears, however, that the facts in the cited case are distinguishable from those here. In the cited case the evidence showed that the defendant store owner's agreement contained no provision for a minimum rental; the designated space, size and location of the millinery department were determined **solely** by the defendant store owner; the injured employee was employed subject to the approval of the store owner; the injured employee considered herself to be an employee of the store owner; and the store owner absorbed the losses on all uncollectible accounts for millinery as with other sales on credit.

The evidence clearly shows that none of the aforementioned facts or other elements of control by the store owner were present in the instant case. Moreover, the evidence, pertinent to the issue of the affirmative defense here,[2] conclusively showed that the respondent never was employed in the millinery business, nor was its direct employees ever engaged in performing the work of buying or selling millinery. Thus, this left the record with no evidence upon which a finding could be made that respondent was engaged in the millinery business so as to warrant the application of the South Carolina Workmen's Compensation Act. The District Judge so considered it and thus it

[2] *Byrd v. Blue Ridge Rural Electric Co-operative,* 356 U. S. 525 at page 529.

became his duty, in accordance with applicable federal law, to withdraw the issue from the jury.

Moreover, the panel of the Court below which rendered the decision herein, not having among its members a South Carolina lawyer, in not only reversing the action of the Chief District Judge dismissing the affirmative defense but also directing entry of judgment for defendant on this defense, contrary to the accepted and usual course of judicial review, did not give due weight to the judgment of the District Judge on the question of local law of a state in which the District Judge was an outstanding and able lawyer of long experience who had served in the South Carolina legislature and as a State Circuit Judge for eighteen years and had sat as an acting Associate Justice of the State Supreme Court. *Bernhardt v. Polygraphic Company of America,* 350 U. S. 198; *Standard Brands v. Bateman,* 184 F. (2d) 1002 (C. A. 8), cert. den., 340 U. S. 942. Appellate courts should be slow to impute to trial courts a want of perspicacity in determining the local law, and, as stated in headnote I, *Nordin v. May,* 208 F. (2d) 131 (C. A. 8), "where question to be determined involved application of state law, which, at best, was at least uncertain on the subject, Court of Appeals on appeal would defer to judgment of Federal District Court concerning the state law."

The issue raised under this heading involves an important question of federal appellate review on which the decision of the Court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for a Writ of Certiorari, should reverse the judgment of the Court below and remand the case to the Court of Appeals for the decision of the undecided question presented by petitioner on her cross-appeal as to a partial new trial for damages only, with instructions that, if such question is decided adversely to petitioner, the Court of Appeals should affirm the judgment of the District Court.

Respectfully submitted,

ROY A. POWELL,
HENRY HAMMER,
Attorneys for Petitioner.

United States Court of Appeals

FOR THE FOURTH CIRCUIT

Nos. 71-1319, 71-1320

GRAYCE E. COROLLO, APPELLEE,

versus

S. S. KRESGE COMPANY, d/b/a K-MART,
APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, AT COLUMBIA. J. ROBERT MARTIN, JR. AND DONALD RUSSELL, DISTRICT JUDGES

(Argued October 6, 1971 Decided March 6, 1972)

Before CRAVEN and BUTZNER, Circuit Judges, and DUPREE, District Judge.

George E. Lewis, Columbia, South Carolina (Turner, Padget, Graham & Laney, Columbia, South Carolina, on the brief) for appellant; Henry Hammer, Columbia, South Carolina (R. A. Powell, Columbia, South Carolina, on the brief) for appellee.

DUPREE, District Judge:

In this diversity action plaintiff obtained a $20,000.00 jury verdict for personal injuries sustained in a slip-and-fall accident which occurred in defendant's department store in Columbia, South Carolina. On appeal defendant

urges as grounds for reversal that there was insufficient evidence of negligence to be submitted to the jury and that in any event plaintiff was guilty of contributory negligence as a matter of law. We agree with the District Court that these questions were properly left for jury determination, but we find merit in defendant's affirmative defense that at the time of the accident the plaintiff was a "statutory employee" of defendant and as such was limited to the rights and remedies accorded covered employees under the workmen's compensation laws of South Carolina. The decisions of that state which govern here have led us to conclude that the judgment should be reversed and the action dismissed.

In a cross-appeal plaintiff contends that the jury awarded inadequate damages, and she seeks a new trial on this issue alone. In view of our conclusion on the workmen's compensation issue consideration of this contention becomes unnecessary.[1]

The defendant S. S. Kresge Company owns and operates a large chain of "discount department stores" throughout the United States and in some foreign countries using the trade name "K-Mart"[2], and henceforth we will refer to the defendant as K-Mart. At the time of plaintiff's accident there were 88 stores in the chain, and the plaintiff had been employed by K-Mart in the lingerie department at the time its Columbia store was opened in 1963. There were 40 or more different departments in this store about eight of which were licensed by K-Mart to various specialty merchandisers. In 85 of the K-Mart stores, including the one in Columbia, the millinery departments were licensed to Benjamin Kraft & Sons, Inc. (here-

[1] The case was actually tried twice. In the first trial the jury awarded $10,000.00. This was set aside as "grossly inadequate" by Judge Martin who ordered a new trial on the negligence and damages issues only. On plaintiff's motion made at the close of defendant's evidence he had stricken defendant's further defense based on the Workmen's Compensation Act. The second trial resulting in the $20,000.00 verdict was before Judge Russell who declined to disturb the verdict. This appeal followed.

[2] In addition to its K-Mart division Kresge has two other divisions, Kresge and Jupiter stores, which are described as "variety discount stores". In this opinion we will be concerned only with the K-Mart division of the chain.

after "Kraft"). Because of space limitations the remaining three K-Mart stores did not have millinery departments.

With the view to obtaining more convenient working hours for herself the plaintiff resigned her position with K-Mart and obtained employment by Kraft to fill a position which became open in its licensed millinery department. She was so employed by Kraft on the morning of August 4, 1964, when shortly after her arrival at the K-Mart store for work she slipped and fell at a place in a hallway where K-Mart's janitor had failed to mop up some soapy water which he had been using in cleaning the floor in the hallway. Although the plaintiff was familiar with the custom of the janitor to clean and mop this hallway daily, he had not been known to leave soapy water on the floor on any previous occasion, and as plaintiff had just turned a corner when this happened, she did not see the hazard in time to avoid it. As a result of her fall the plaintiff sustained painful and perhaps permanently-disabling injuries.

The store building in which this occurred contained approximately 94,000 square feet all under one roof. The area within the store is completely open, and Kraft and the other licensees of departments are allotted space in the store. The store is opened each morning and closed each evening by K-Mart employees, and no one else has authority to open or close the store. The various licensee departments cannot operate except during K-Mart's established hours. All counters, display cases and store fixtures used by the licensed departments are furnished by K-Mart and are the same kind and appearance as those used by K-Mart in its own departments. There are no partitions separating the licensed departments from those of K-Mart.

All persons who worked in the store wore badges which identified them as K-Mart employees. While the plaintiff was directly employed by K-Mart her badge contained a number and her name. After she was employed by Kraft in addition to her name the badge contained the words "Millinery Department Supervisor". There was no sign in or about the business indicating that Kraft was the licensee of the millinery department, and neither plaintiff

nor Kraft's other employee in the store handled any money. Instead, tickets were written for sales made in the millinery department, and as in the case of all sales made by any department in that store, payment was made at a checkout counter where a number of cash registers, all owned and operated by K-Mart, were located. Separate key designators on the cash registers enabled the cashiers to segregate the money of K-Mart from that of the various licensees as it was taken in. K-Mart accounted directly to Kraft's home office for the proceeds of Kraft's sales.

The written agreement between K-Mart and Kraft was contained in a document entitled "K-Mart License Agreement", apparently a standard from contract used by K-Mart with all its licensees. Kraft's agreement, dated March 19, 1963, was for the operation of "a department for the sale of certain merchandise described and classified as follows: millinery and handbags". The essential terms of the agreement are set forth in the margin.[3]

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[3] 1. Term. One year with automatic renewal subject to right of either party to terminate on three months' written notice.

2. Area to be occupied by Kraft. To be mutually agreed upon but with right of K-Mart to change the location and right of Kraft to terminate upon thirty days' written notice if not satisfied with the relocation.

3. License fees. A percentage of Kraft's gross sales subject to a minimum annual fee at the rate of $4.50 per square foot of Kraft's selling space.

4. Kraft to comply with all laws applicable to its operation and furnish evidence of compliance with workmen's compensation and other disability laws.

5. Furniture and fixtures to be furnished by K-Mart.

6. Cash registers to be furnished by K-Mart.

7. Utilities to be furnished by K-Mart.

8. Telephones. "The licensor shall provide at its expense telephone service and facilities for incoming calls under the general listing of K-Mart. The licensee may provide additional telephone service under a separate listing identifying its department under the name of K-Mart."

9. Use of name. "The licensee shall conduct its sales on the premises solely under the name of K-Mart. The licensee, however, may neither pledge the credit, incur any obligation or liability, hire any employees, nor purchase any merchandise or services under the name of the licensor or K-Mart, it being understood that neither party to this agreement shall act as the agent, servant or employer of the other party."

10. Rules and regulations. K-Mart retains right to establish uniform rules and regulations with which licensee agrees to comply governing but not limited to "the order and appearance of the store, methods for handling of cash and cash registers, credit, will-call and lay-away sales, payments made by licensor for account of licensee, refunds, pricing

Kraft had less than fifteen employees and was therefore not required by law to carry workmen's compensation insurance. In compliance with its agreement with K-Mart, however, Kraft did carry such insurance. K-Mart carried its own workmen's compensation insurance. Plaintiff made claim and was paid workmen's compensation benefits by Kraft's carrier. Any recovery by plaintiff in this common law action would inure by subrogation to Kraft's carrier to the extent of such benefits paid.

Title 72, South Carolina Code of Laws for 1962, Section 111, provides:

"When any person, in this section and §§ 72-113 and 72-114 referred to as 'owner', undertakes to perform or execute any work which is a part of his trade,

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policies, inventory requirements, disposal of old merchandise, overlap in merchandise carried by various licensees, products liability insurance, employment practices, personnel and store policies, receiving of merchandise and store security.

11. Assignment of license prohibited without consent of licensor.

12. Janitor and security service to be provided by K-Mart except in Kraft's storage area.

13. Advertising. All under sole and exclusive control of K-Mart. Kraft to pay two per cent of its gross sales for advertising to be included in K-Mart ads.

14. Merchandise. Kraft's sales limited to millinery and handbags.

15. Indemnification. Kraft to hold K-Mart harmless from claims and litigation arising out of patents, trade marks, copyrights, labeling, unfair competition and products liability.

16. Records. Kraft's records to be kept in accordance with established accounting practices with right of audit in K-Mart.

17. Credit sales. Kraft to use K-Mart's "Thrifty Charge Plan" and not to use other credit facilities.

18. Memberships in trade organizations and charitable contributions. K-Mart to establish common standards and Kraft to bear "its proper share of the cost and obligation of such activities."

19. Risk of loss or damage to property "shall as between licensor and licensee be exclusively that of the party having title to such property."

20. K-Mart to provide comprehensive general liability policy insuring K-Mart with Kraft paying its prorata part of premium.

21. Termination of license. K-Mart may terminate in event of condemnation of property, failure of Kraft's sales to total $45.00 per square foot of space occupied for twelve consecutive months, failure of Kraft to comply with K-Mart's established rules and regulations or Kraft's bankruptcy.

22. Rights and remedies. Stated rights and remedies not exclusive but cumulative and in addition to those allowed by law. Agreement to be construed under Michigan law and "the parties do not intend this agreement to constitute a joint venture, partnership, or lease and nothing herein shall be construed to create such a relationship."

> business or occupation and contracts with any other person (in this section and §§ 72-113 to 72-116 referred to as 'subcontractor') for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him."

Title 72, Section 121, of the same Code, provides as follows:

> "The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents, or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death."

Since we hold that defendant was not entitled to a directed verdict on the negligence issues, the only remaining question for decision is whether under the undisputed facts the South Carolina workmen's compensation laws constituted a bar to the maintenance of this common law tort action in the District Court. K-Mart contends that it was an "owner" and that the millinery department in its store was operated by Kraft as a subcontractor within the purview of Section 72-111 of the South Carolina Code quoted above; that plaintiff was therefore a "statutory employee" of K-Mart; and that as such she was limited to the exclusive remedy of the Workmen's Compensation Act as provided by Section 72-121 of the Code. We agree.

Plaintiff alleged in her complaint that the defendant was "engaged in the business of distributing and selling at retail divers goods and merchandise" and "that on or about August 4, 1964, the defendant in the course of its business was the owner, in control of and maintained a large retail merchandising establishment known as K-Mart on Jackson Boulevard in the City of Columbia, Richland County, South

Carolina, in which were certain licensed departments, including the millinery department leased by Benjamin Kraft & Sons." These allegations were admitted by the defendant. That K-Mart was a department store in the ordinary sense of the term is not open to question.[4] That the agreement with Kraft for the operation of the millinery department did not remove that department from the scope of K-Mart's "trade, business or occupation" as those terms are used in the statute is equally clear.

We think the decision of the South Carolina Supreme Court in *Adams v. Davison-Paxon Company*, 230 S. C. 532, 96 S. E. (2d) 566 (1957) is indistinguishable and that it controls decision here.

In that case the Davison Company operated "a general retail department store" which included departments of men's and ladies' ready-to-wear, shoes, hats, etc., but its ladies' hat department was operated by Emporium World Millinery Company under a contract very similar in its terms to the license agreement between K-Mart and Kraft in this case. For instance, the space occupied by Emporium in its operation of the millinery department was selected by Davison; all Emporium's sales were conducted in Davison's name and the cash resulting was run through Davison's cash registers; Davison furnished all utilities, janitor service, fixtures and building maintenance; the conduct of Emporium's business was subject to Davison's rules and regulations; Emporium was responsible for its own employees' salaries; Emporium paid for fire, workmen's compensation and liability insurance and all taxes on its own operations; Emporium reimbursed Davison for advertising; the millinery department was not separated by partition or otherwise from the other departments in the store;

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[4] An exhibit elicited by plaintiff in response to a pre-trial request for admissions contains this typical K-Mart ad:

"WE'RE A ONE-SHOP STOPPING CENTER.

"It takes a lot, sometimes, to please a large family, but K-Mart does it. In one shop. Garden supplies for the home. Clothes for everyone. Fishing gear for a young sportsman. A doll for your littlest girl. And a snack for the whole family. You'll find nearly all of your favorite brands under one roof at K-Mart . . . with acres of free up-front parking.

". . . That's why . . .

"YOU'RE SAFE WHEN YOU SAVE AT K-MART."

and, as the court said, "The whole public conduct of the business was in the name of Davison's, including advertising and window displays".[5]

On these facts the South Carolina court held that the sale of millinery was a part of the trade, business and occupation of Davison and that the exclusive remedy of Emporium's injured employee was under the Workmen's Compensation Act. The judgment she had obtained against Davison in her common law action was reversed.

In reaching this result the court relied on its earlier decision in *Marchbanks v. Duke Power Company*, 190 S. C. 336, 2 S. E. (2d) 825 (1939), which was described as "the first and leading case upon the construction and application of the subject statute". In that case the plaintiff stressed, as does the plaintiff here, the absence of those elements of control necessary to establish the common law relationship of master and servant between the plaintiff and the defendant owner. It was contended that such relationship does not exist where an employee is working for an independent contractor who is performing work for the owner. The short answer given by the court to this argument was that if the common law relationship of master and servant existed, the plaintiff would be entitled to compensation under the general provisions of the Act independently of the provisions of the owner liability statute (Section 72-111 of the S. C. Code) which would then serve no useful purpose.[6] Suffice it to say that no South Carolina

[5] In her effort to distinguish the *Adams* case plaintiff points to certain differences between the license agreements in the two cases, *e. g.*, absence of agreement for a minimum rental to be paid by Emporium under the Davison agreement; absence of explicit right of Emporium to participate in the initial selection of the size and location of the millinery department; Davison's explicit reservation of the right to approve employees hired by Emporium; that Emporium's employee (plaintiff in that action) "considered herself to be an employee of defendant (Davison)"; and that Davison absorbed losses on uncollectible accounts for millinery. We do not feel these differences are significant in the determination of the ultimate question involved in each of the two cases.

[6] In the instant case there was frequent mention during the argument on plaintiff's motion in the District Court of the fact that K-Mart "had nothing to do with the hiring, the firing, the paying or control over any employee of the licensee". In view of the provisions of the license agreement subjecting Kraft to K-Mart's rules and regulations "governing but not limited to . . . employment practices, personnel and

case has been found involving this statute in which an owner's liability either for payment of compensation or tort damages has been made to rest upon the degree of control retained by the owner over the injured employee of a subcontractor. On the contrary, once it is established that the work being done by the subcontractor is a part of the owner's general business, the employees of the subcontractor become statutory employees of the owner even though their immediate employer is an independent contractor. *Bridges v. Wyandotte Worsted Company*, 243 S. C. 1, 132 S. E. (2d) 18 (1963). See also *MacMullen v. South Carolina Electric & Gas Co.*, 312 F. (2d) 662 (4th Cir. 1963) where Judge Boreman reviews and analyzes the prior South Carolina cases on this question.

The primary basis for plaintiff's argument that Kraft's millinery business was not a part of the "trade, business or occupation" of K-Mart is that had never been engaged in the millinery business. Plaintiff points to the fact that K-Mart had no millinery department of its own in any of its 88 stores—that in 85 of them the department was leased to Kraft and that in the remaining three stores there were no millinery departments.[7]

But the inquiry here is not whether K-Mart as owner was engaged in the millinery business or had ever been, but whether Kraft's millinery business was a part of the business of K-Mart which was that of operating a department store.[8] *Boseman v. Pacific Mills*, 193 S. C. 479, 8 S. E.

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store policies" (see No. 10, Footnote 3, *supra*), the factual basis for plaintiff's argument is open to question. However, the District Judge, fully cognizant of the South Carolina decisions, did not ground his ruling on the absence of a master-servant relationship, but rather considered the evidence on this point an indication of the separability of the Kraft and K-Mart businesses.

[7] K-Mart's witness attributed this to space limitations in these three stores.

[8] "Practically all of the cases of general interest interpreting this type of statute are addressed to one question: When is the subcontracted work part of the regular business of the statutory employer? The statutory language lying behind this question varies somewhat; . . . some use the phrase "any work which is a part of his trade, business or occupation'; . . . But, with a surprising degree of harmony, the cases applying these assorted phrases agree upon the general rule-of-thumb that the statute covers all situations in which work is accomplished which this employer, or employers in a similar business, would ordinarily do through employees." 1A Larsen, Workmen's Compensation Law, § 49.12 at 859-60.

(2d) 878 (1940). See also *Kennerly v. Ocmulgee Lumber Company*, 206 S. C. 481, 34 S. E. (2d) 792 (1945); *Hopkins v. Darlington Veneer Company*, 208 S. C. 307, 38 S. E. (2d) 4 (1946). Indeed it may be inferred that K-Mart had no desire to engage directly in the business of selling ladies' hats and handbags in any of its stores. But if it was to provide, as its ads proclaimed, "clothes for everyone" in a "one-shop stopping center", inevitably these integral items of feminine finery had to be made available to its lady customers. K-Mart's arrangement with Kraft, whose business apparently was limited to millinery and handbags, was the method chosen to carry on this part of its business. And, as we have seen, in South Carolina it is held that a millinery department operated in a general retail department store by a licensee under terms not materially different from those here involved is a part of the trade, business or occupation of the department store owner within the purview of the statute, Section 72-111. In turn the owner by reason of Section 72-121 is immune to tort liability to the licensee's employees for injuries sustained in the course and scope of their employment."

The decisions in this Circuit are in accord: *Turnage v. Northern Virginia Steel Corp.*, 336 F. (2d) 837 (4th Cir. 1964); *Evans v. Newport News Shipbuilding & Drydock Co.*, 361 F. (2d) 364 (4th Cir. 1966). The fact that these cases involve an application of Virginia law does not de-

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[*] *Adams v. Davison-Paxon Company*, 230 S. C. 532, 96 S. E. (2d) 566 (1957). In this case Chief Justice Stukes distinguished *Stratis v. McLellan Stores Company*, 311 Mass. 525, 42 N. E. (2d) 282, 142 A. L. R. 1393 (1942), which had held a lunch counter concession in a department store not to be a part of the department store owner's business, saying:

"We think it obvious that the sale of millinery is more a part of the trade, business and occupation (the words of the statute) of a department store such as appellant, than is the sale of food and soft drinks at a lunch counter. This is not to say that the latter may not be such, but surely millinery is more clearly so."

It is interesting to note that the *Stratis* case was later overruled in *Tindall v. Denholm and McKay Co.*, 347 Mass. 100, 196 N. E. (2d) 631 (1964), a case remarkably similar on its facts to *Adams* and the one at bar. The Massachusetts Supreme Judicial Court held the millinery department of a licensee to be a part of the business of the department store owner so as to make the licensee's employee a statutory employee of the owner under the Massachusetts Compensation Act and to relieve the owner from liability to the employee in a common law action.

tract from their authority, for the comparable workmen's compensation statute in that state. Section 65.1-29 of the Code of Virginia (formerly Section 65-26) is identical with the South Carolina statute, Section 72-111.[10]

Finally, plaintiff insists that in the event it is held that defendant's plea was improperly stricken, she is entitled to have the question of her status as a statutory employee determined by a jury, citing *Byrd v. Blue Ridge Rural Electric Co-operative*, 356 U. S. 525, 78 S. Ct. 893, 21 L. Ed. (2d) 953 (1958). This contention is made in the face of the fact that plaintiff's motion to strike the defense was lodged at the close of defendant's evidence without the tender of any rebuttal evidence and on the sole ground that the undisputed evidence showed the plaintiff not to be a statutory employee of K-Mart.[11]

While the implications of the *Byrd* case have been the subject of much discussion and commentary,[12] the contention made by plaintiff here has been rejected by this court in *Walker v. United States Gypsum Co.*, 270 F. (2d) 857 (4th Cir. 1959) (cert. denied, 363 U. S. 805, 80 S. Ct. 1240, 4 L. Ed. (2d) 1148). In that case Judge Haynsworth in a trenchant analysis of the problem raised by *Byrd* held that the plea based on the workmen's compensation statute must be treated as an affirmative defense and if there is no issue of fact genuinely in dispute, the question of em-

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[10] Cases construing similar language in the unemployment compensation statutes have reached the same result. See, for example, *Unemployment Compensation Commission v. L. Harvey & Son Co.*, 227 N. C. 291, 42 S. E. (2d) 86 (1947) (department store owner held liable for unemployment tax on employees of a leased shoe department). See Annot., 159 A. L. R. 1214 (1944).

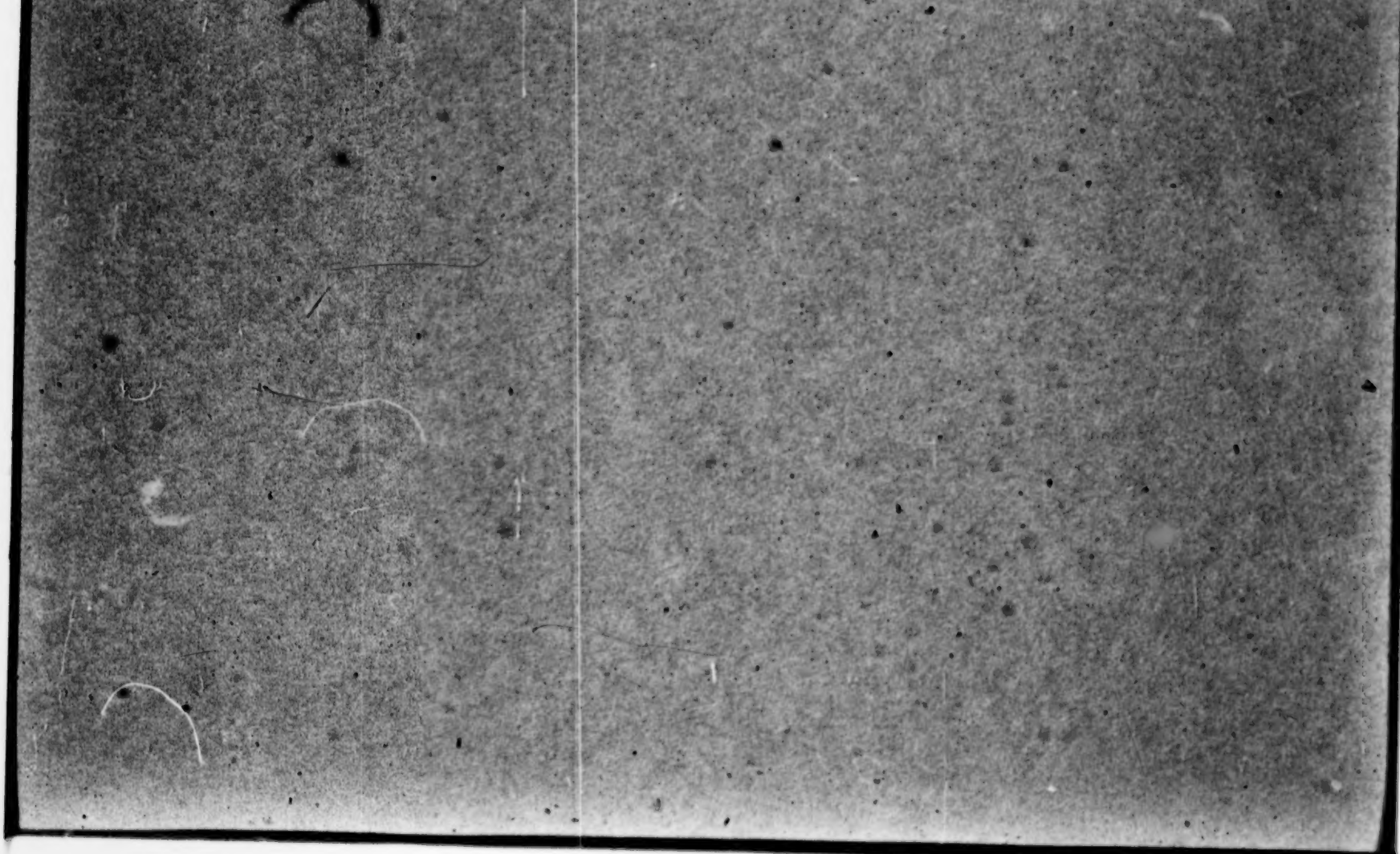
[11] On the argument in the District Court plaintiff's counsel did state in response to an inquiry from the bench that in the event the motion were denied he had "one very short reply". In this court he stated that any further evidence would have related to the question of K-Mart's control over Kraft's employees. As previously stated, we do not regard the presence or absence of such control determinative. Additional evidence on this point could only have confirmed what the record already showed. Moreover, it is difficult to envision what other evidence plaintiff might have offered to alter the legal consequences of the written contract and course of dealings between K-Mart and Kraft, and the evidence as to these matters was not in dispute.

[12] See Whicher, *The Erie Doctrine and the Seventh Amendment: A Suggested Resolution of their Conflict*, 37 Tex. L. Rev. 549; Note, *Seventh Amendment Restrictions on the Erie Doctrine*, 43 Minn. L. Rev. 580.

ployment status is to be determined by the court. *Byrd* and its sequel, *Magenau v. Aetna Freight Lines, Inc.*, 360 U. S. 273, 79 S. Ct. 1184, 3 L. Ed. (2d) 1224 (1959), were read not to require submission of the issue to a jury. Indeed this court in a similar context has held that where there is no dispute as to the basic facts, it would be reversible error to submit the question of employment status to a jury. *Burriss v. Texaco, Inc.*, 361 F. (2d) 169, 174 (4th Cir. 1966).

On the uncontradicted evidence here the conclusion is that the plaintiff was barred by the workmen's compensation statutes from maintaining this action and that it was error to strike defendant's plea in bar. It follows that defendant's motion to dismiss made at the close of the evidence should have been allowed.

Reversed and remanded for dismissal.



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Supreme Court of the United States

OCTOBER TERM 1972

No. 71-1995

GRAYCE E. CAROLLO, PETITIONER,

versus

S. S. KRESGE COMPANY, D/B/A K-MART,
RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF CASE

Petitioner, a resident of South Carolina, brought suit against S. S. Kresge Company, d/b/a K-Mart, a Michigan corporation, to recover damages for negligence in failing to exercise due care in the maintenance of a portion of its premises in the K-Mart store operated on Jackson Boulevard in Columbia, South Carolina, in which the Petitioner fell on a slippery floor and sustained permanent injuries. At the time of her injuries, Petitioner was employed by Benjamin Kraft and Sons which was operating the millinery department in this store under a License Agreement with the S. S. Kresge Company, d/b/a K-Mart, the essen-

tial terms of which were set forth in the margin of the opinion of the Court below.

For the purpose of consideration of this Petition, the only question involved was whether or not the Petitioner was a "statutory employee" of the Defendant S. S. Kresge Company, d/b/a K-Mart, within the meaning of the South Carolina Workmen's Compensation Statute so as to be barred from bringing this action.

The District Court, in the first trial of this matter, granted the Petitioner's motion to strike the defense interposed by the Respondent to the effect that her remedy was one exclusively under the South Carolina Workmen's Compensation Act. The matter was thereafter submitted to the jury which returned a verdict for Ten Thousand ($10,000.00) Dollars. The trial Court set this aside as being inadequate and granted a new trial only as to the issues submitted to the jury. The matter was thereafter tried by another Judge and jury and resulted in a verdict for the Plaintiff in the sum of Twenty Thousand ($20,000.00) Dollars. Appropriate motions were by both parties and the trial Court declined to disturb the verdict. Appeals were taken to the Fourth Circuit Court of Appeals and that Court determined that the Petitioner, under the undisputed facts, was a "statutory employee" of the Respondent and reversed the trial Court and remanded with instructions to enter judgment for the Respondent.

REASONS FOR DENYING THE WRIT

The decision of the Court below is in accord with the applicable decisions of this Court.

Petitioner contends that the decision of this Court have held that "it is beyond the legitimate function of an appellate court, in reversing the ruling of a District Judge, to deprive a party of the right to controvert material facts and have a trial on the merits, by directing judgment

against him, where such party had no occasion to dispute or controvert the material facts of the opposite party because of the ruling of the District Court." Accepting this as a correct statement of prior holdings of this Court, it avails Petitioner nothing. The fact is that Plaintiff has not been deprived of the right to controvert "material facts". Counsel acknowledged to the Court of Appeals that any reply testimony which he would have presented would have related to the question of K-Mart's control of Kraft's employees. Such would not have been material since it would "only have confirmed what the record already showed", that is, that Petitioner was acutally an employee of Kraft. This, as the Court below held, is not the determinative question. Rather the question is whether Kraft's millinery business was a part of the business of K-Mart, which was that of operating a department store. As the Court below stated, " * * * But if it was to provide, as its ads proclaim, 'clothes for everyone' in a 'one-shop stopping center' [sic] inevitably these integral items of feminine finery had to be made available to its lady customers. K-Mart's arrangement with Kraft, whose business apparently was limited to millinery and handbags, was the method chosen to carry on this part of its business. And as we have seen, in South Carolina it is held that a millinery department operated in a general retail department store by a licensee under terms not materially different from those here involved is a part of the trade, business or occupation of the department store owner within the purview of the statute, Section 72-111. In turn the owner by reason of Section 72-121 is immune to tort liability to the licensee's employees for injuries sustained in the course and scope of their employment."

In short, there was no dispute as to the facts involved and the only question was the legal effect of these undisputed facts. The applicable decisions of this Court hold

that in such a situation the question of employment status is to be determined by the Court. *Walker v. United States Gypsum Co.*, 270 Fed. (2d) 857 (4th Circuit 1959). (*Certiorari* denied 363 U. S. 805, 80 S. Ct. 1240, 4 Lawyers Edition (2d) 1148). *McMullen v. South Carolina Electric & Gas Co.*, 312 Fed. (2d) 662 (*Certiorari* denied 373 U. S. 912, 83 S. Ct. 1302, 10 Lawyers Edition (2d) 413).

The actions of the Court below did not constitute an invasion of the province of the jury contrary to the Seventh Amendment to the United States Constitution.

Petitioner contends that the evidence presented a factual issue as to whether Respondent was engaged in the millinery business and her contention is based upon the erroneous premise that the Court below has chosen between permissible inferences raised by the evidence. It is submitted that under the undisputed facts there was but one reasonable inference which could be drawn. It was alleged and admitted that the Respondent was "engaged in the business of distributing and selling at retail divers goods and merchandise" and that "the defendant in the course of its business was the owner, in control of and maintained a large retail merchandise establishment * * * in which were certain licensed departments, including the millinery department leased by Benjamin Kraft & Sons." As stated by the Court below "That K-Mart was a department store in the ordinary sense of the term is not open to question. That the agreement with Kraft for the operation of the millinery department did not remove that department from the scope of K-Mart's 'trade, business or occupation' as those terms are used in the statute is equally clear." The agreement with Kraft was simply the method by which Respondent chose to handle the millinery portion of its department store business.

Under the undisputed facts and the ruling of the South Carolina Supreme Court in the case of *Adams v.*

Davison-Paxon Co., 230 S. C. 532, 96 S. E. (2d) 566, which case involved an agreement strikingly similar to the agreement here involved, the Court below correctly ruled that Petitioner was a "statutory employee" and barred by the Workmen's Compensation Statutes from maintaining this action.

The action of the Court below is consistent with applicable federal procedure and applicable state law.

The conclusion of that Court was that the evidence and applicable state decisions conclusively showed that the operation of the millinery department was part of the "trade, business or occupation" of K-Mart. In her argument on this point, Petitioner seeks to point out distinctions between the facts in the case of *Adams v. Division-Paxon Co., Supra*, and the facts of the instant case. Certainly there are minor and immaterial differences in such facts, but such distinctions do not change the fact that the operation of a millinery department with respect to the overall operation of a department store, is work "which this employer, or employers in a similar business, would ordinarily do through employees." 1A **Larsen, Workmen's Compensation Law**, Section 49.12 at 859-60.

CONCLUSION

For the reasons set out herein, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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